Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

HARRY C. PIPER, III,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE and FEDERAL BUREAU OF INVESTIGATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Harry C. Piper, III seeks information through the Freedom of Information Act ("FOIA") about the FBI's investigation of his mother's 1972 kidnapping for inclusion in a book he is writing on the subject. The government records provided to him to date contain such extensive redactions that his understanding of the actions of the government in the kidnapping investigation and prosecution is defeated.

1. Which of the conflicting tests applied by United States courts of appeal to decide FOIA privacy exemptions b(7)(C) and b(6) should be applied, or is another standard appropriate?

2. Whether the Supreme Judicial Court of Maine has properly interpreted rulings of this Court related to the FOIA privacy exemptions where the opinion of the Maine court conflicts with the analysis of United States courts of appeal, including the First Circuit in which Maine is located?

3. Whether the FOIA privacy exemptions b(6) and b(7)(C) are now asserted and upheld so extensively that they defeat the core purpose of FOIA to inform the public of the activities of the government?

4. Where in an FOIA case a federal agency grants a full public interest fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) because disclosure of the requested records likely would contribute significantly to the public's understanding of the activities of the government, whether the agency can then argue minimal public interest in the balancing test for FOIA exemptions b(7)(C) and b(6) that calls for a balancing of public interests versus privacy interests?

QUESTIONS PRESENTED FOR REVIEW – Continued

5. Whether the public's right to know about good or middling government performance should also be considered in the public interest element of the public interest versus privacy interest balancing test for FOIA exemptions b(7)(C) and b(6), rather than limiting the definition of public interest solely to evidence of government misconduct?

6. Whether an agency can ignore the fact of a person's death in asserting that person's privacy interest and fail to make any effort to determine whether a person whose privacy rights are asserted is in fact deceased?

LIST OF ALL PARTIES

The parties to the case in the United States Court of Appeals for the District of Columbia Circuit were Harry C. Piper, III, Appellant; and United States Department of Justice ("DoJ") and Federal Bureau of Investigation ("FBI"), Appellees.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	ii
LIST OF ALL PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
CITATIONS TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS BELOW	1
STATEMENT OF BASIS OF JURISDICTION	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	4
ARGUMENT	10
I. A conflict exists between decisions of United States circuit courts of appeal as to the proper legal test for FOIA privacy exemptions b(7)(C) and b(6) following this Court's decision in *National Archives and Records Administration v. Favish,* 541 U.S. 157 (2004)	10
II. A conflict exists between a decision of the Supreme Judicial Court of Maine and the First Circuit and other United States circuit courts of appeal in interpreting the *Favish* decision of this Court	13
III. In this case the Court of Appeals improperly failed to apply the *Favish* decision of the Supreme Court	15
IV. The government asserts privacy exemptions so extensively that the core purpose of FOIA to understand agency action is defeated	18

TABLE OF CONTENTS – Continued

Page

a. The public interest is not limited to facts that discredit the Government, rather there is also a public interest in knowing about good or even middling government performance 21

b. DoJ has not taken reasonable steps to determine whether persons have died for whom it invokes the privacy exemptions. In fact one of the persons tried for kidnapping Mr. Piper's mother has died, yet this fact has not been taken into consideration by DoJ in its assertions of privacy exemptions. Privacy interests are diminished by death of individuals 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Blethen Maine Newspapers, Inc. v. *State*, 871 A.2d 523 (Me. 2005); 2005 ME 56 ..... 13, 14, 15

Boyd v. *Criminal Division of U.S. Department of Justice*, 475 F.3d 381 (D.C. Cir. 2007) 12

Davis v. *U.S. Department of Justice*, 460 F.3d 92 (D.C. Cir. 2006) 24, 25, 26

Carpenter v. *U.S. Department of Justice*, 470 F.3d 434 (1st Cir. 2006) 12, 14

Horowitz v. *Peace Corps*, 428 F.3d 271 (D.C. Cir. 2005) 11

National Archives and Records Administration v. *Favish*, 541 U.S. 157 (2004) ..... *passim*

Oguaju v. *United States*, 378 F.3d 1115 (D.C. Cir. 2004) 11

Perlman v. *U.S. Department of Justice*, 312 F.3d 100 (2nd Cir. 2002) 11

Perlman v. *U.S. Department of Justice*, 380 F.3d 110 (2nd Cir. 2004) 11

Piper v. *U.S. Department of Justice*, 294 F. Supp. 2d 16 (D.D.C. 2003) 1, 9

Piper v. *U.S. Department of Justice*, 312 F. Supp. 2d 17 (D.D.C. 2004) 1

Piper v. *U.S. Department of Justice*, 339 F. Supp. 2d 13 (D.D.C. 2004) 1, 24

Piper v. *U.S. Department of Justice*, 374 F. Supp. 2d 73 (D.D.C. 2005) 1

TABLE OF AUTHORITIES – Continued

Page

Piper v. *U.S. Department of Justice*, 428 F. Supp. 2d 1 (D.D.C. 2006) 1, 9

SafeCard Services, Inc. v. *SEC*, 926 F.2d 1197 (D.C. Cir. 1991) 16, 17

Schrecker v. *U.S. Department of Justice*, 254 F.3d 162 (D.C. Cir. 2001) 25

U.S. v. *Larson, et al.*, 596 F.2d 759 (8th Cir. 1979) 6, 23

U.S. Department of Justice v. *Landano*, 508 U.S. 165 (1993) 24

U.S. Department of Justice v. *Reporters Committee*, 489 U.S. 749 (1989) 13, 18, 21

Vaughn v. *Rosen (I)*, 484 F.2d 820 (D.C.Cir. 1973), *cert. denied*, 415 U.S. 977 (1974) 18, 19, 25

Wood v. *F.B.I.*, 432 F.3d 78 (2nd Cir. 2005) 11

STATUTES

5 U.S.C. § 552 ..... *passim*

CITATIONS TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS BELOW

The opinions and orders entered below are the unpublished Judgment of the United States Court of Appeals for the District of Columbia Circuit entered February 23, 2007 in No. 06-5119, App. 1, 2007 WL 754750, 2007 U.S. App. LEXIS 4272; the Memorandum Opinion and Order of the United States District Court of the District of Columbia dated December 1, 2003, App. 10, published as *Piper* v. *U.S. Department of Justice*, 294 F. Supp. 2d 16 (D.D.C. 2003); the Memorandum and Order of the District Court granting U.S. Department of Justice's Rule 60(b) motion dated April 12, 2006, App. 3, published as *Piper* v. *U.S. Department of Justice*, 428 F. Supp. 2d 1 (D.D.C. 2006). The District Court denied the U.S. Department of Justice's motion for reconsideration of the December 1, 2003 opinion and order, by Memorandum Opinion and Order dated March 26, 2004 as amended May 13, 2004, App. 40, published as *Piper* v. *U.S. Department of Justice*, 312 F. Supp. 2d 17 (D.D.C. 2004). There are two other reported decisions from the district court's handling of the case. First, the district court preliminarily indicated that it was willing to grant the government's FRCP 60(b) motion should the court of appeals remand the case for such proceedings. *Piper* v. *U.S. Department of Justice*, 374 F. Supp. 2d 73 (D.D.C. 2005). Second, the district court granted Petitioner Piper's motion for an award of attorneys fees and costs subsequent to the district court's 2003 disposition of the case. *Piper* v. *U.S. Department of Justice*, 339 F. Supp. 2d 13 (D.D.C. 2004).

STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction of this case pursuant to 28 U.S.C. §§ 1254(1) and 2101(c) to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit entered February 23, 2007 in No. 06-5119, App. 1.

STATUTORY PROVISIONS

Petitioner Piper sets forth pertinent portions of statutes and regulations that are applicable to determination of this appeal.

1. The following parts of the Freedom of Information Act, 5 U.S.C. § 552 are applicable:

(a) Each agency shall make available to the public information as follows:

* * *

(3)(A) . . . each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * *

(4)(A)(iii) Documents shall be furnished without charge or at a charge reduced below the fees established under clause (ii) if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

* * *

(4)(B) On complaint, the district court of the United States . . . in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order production of any agency records improperly withheld from the complainant. In such case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action . . .

* * *

(b) This section does not apply to matters that are –

. . . (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records of information compiled for law enforcement purposes, but only to the extent that such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or

> by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law . . .

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection . . .

See 5 U.S.C. § 552.

STATEMENT OF THE CASE

Petitioner Harry C. Piper, III, using the Freedom of Information Act (5 U.S.C. § 552), seeks to obtain information related to the kidnapping of his mother, the late Virginia Piper, in July 1972 in Minneapolis, Minnesota, so that he can understand the FBI and DoJ decisions and actions in the case. Mr. Piper is writing a book about the kidnapping case and seeks the government records for that effort. The FBI granted Mr. Piper a 100% public interest fee waiver of search and duplication fees for his FOIA request pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). In granting a full public interest fee waiver the FBI stated that disclosure of records in this case likely would *significantly* contribute to public understanding of the activities and operations of the government. FBI Kelso letter granting 100% public interest fee waiver. App. 48, *emphasis added.*

However, the extensive deletions and withholdings from the released information, estimated by Petitioner

Piper to be 30% of the requested information, defeats understanding of agency actions. As amplified in the Argument section following, Petitioner Piper seeks the intervention of this Court to review this case and to reconcile conflicting decisions among the circuit courts of appeal in applying the b(7)(C) and b(6) privacy exemptions. In addition, the Supreme Judicial Court of Maine has reached a differing conclusion from its own federal circuit court of appeals and other federal circuits in interpreting federal case law related to the privacy exemptions, thus creating a conflict in analysis between a state court of last resort and federal circuit courts of appeal. Additionally, this case calls for this Court to decide important undecided issues of federal FOIA law raised by FBI's actions in granting a full public interest fee waiver, but then withholding so much material under the privacy exemptions as to defeat understanding of the agency's actions, including material about persons who are deceased. These issues are of national scope and importance in that government agencies assert the FOIA privacy exemptions extensively to withhold information about government activities, often defeating the core purpose of the Freedom of Information Act to inform the public of government activities. Support for the importance of over breadth of privacy assertions can be found in the recent tragic Virginia Tech shootings in which privacy concerns over mental health treatment records are reported to have defeated proper application of the law requiring background checks for gun purchases.

Additional background for this case is the fact that Petitioner Piper's mother, Virginia Piper, was safely returned in 1972 after her family paid a $1 million cash ransom, reportedly the largest ransom ever paid in a

kidnapping in the United States to that date. After a multi-year investigation, said to be one of the FBI's largest investigative efforts in the 1970's, federal charges were brought against two defendants. Despite two highly publicized trials of these defendants in federal district court in Minnesota, no perpetrators were ultimately found guilty of the crime, nor was the ransom money recovered. The Virginia Piper kidnapping thus remains a famous unsolved major crime in the United States.

Petitioner Harry C. Piper, III is the son of Harry C. Piper, Jr. and Virginia Piper, now both deceased, and he is a writer who is authoring a book about the kidnapping case. He seeks the records at issue in this case to use in writing the book. Mr. Piper is a Stanford University educated attorney and was employed at one time as an attorney for the U.S. Department of Justice. Petitioner's father, Harry C. Piper, Jr. founded the Piper, Jaffray investment banking firm in Minneapolis, where the family has played a prominent role in the community.

Although two defendants, Donald F. Larson and Kenneth Callahan, were initially convicted of the Virginia Piper kidnapping, the convictions were overturned and a retrial ordered by the U.S. Court of Appeals for the Eighth Circuit. The basis of the reversal was testimony excluded by the trial court of one Lynda Lee Billstrom (a/k/a Linda Burt Billstrom) to the effect that she witnessed planning sessions for the kidnappings by a group of persons other than the charged defendants. *U.S.* v. *Larson, et al.*, 596 F.2d 759 (8th Cir. 1979). Upon retrial of Larson and Callahan, Lynda Lee Billstrom's testimony was admitted in evidence, and a defense expert testified that an FBI fingerprint exhibit presented to link defendant Larson to the crime had been enhanced in order to make an identification of the print.

Further, just before the start of the retrial, the Assistant U.S. Attorney who was the prosecutor for the government in both trials was arrested for soliciting prostitution, an event which appeared in the newspapers and other news media. The charged defendants Larson and Callahan were acquitted in the retrial, and there have been no subsequent prosecutions for the Virginia Piper kidnapping, nor has the $1 million in ransom money been recovered, other than a few thousands dollars in FBI possession found in Federal Reserve circulation (serial numbers were retained for the ransom cash and thus it can be identified).

Petitioner Piper filed suit under the Freedom of Information Act in 1998 seeking release of records from the FBI and other components of the U.S. Department of Justice ("DoJ") after his 1997 FOIA request to the FBI was not acted upon, and DoJ's Executive Office of U.S. Attorneys ("EOUSA") denied his request. The basis for the District Court's jurisdiction was the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B), which provides jurisdiction for the court to enjoin an agency from withholding agency records and to order the production of any agency records improperly withheld from the requester. Petitioner Piper made requests by written letter to respondents U.S. Department of Justice and its component FBI in 1997. The request to FBI was constructively denied by FBI's failure to answer it within the time period in the statute, and DoJ's EOUSA denied Mr. Piper's request. Mr. Piper administratively appealed the EOUSA's denial, and his appeal was constructively denied by EOUSA's failure to rule on the appeal within the statutory period.

During the litigation the parties settled Petitioner Piper's claims against the Executive Office for U.S. Attorneys and U.S. Attorney's Office for the District of Minnesota in

light of discovery that the U.S. Attorney's office files on the kidnapping had been destroyed by the Assistant U.S. Attorney who prosecuted the case.

For its part, the FBI sought a four-year stay of proceedings in the case claiming a backlog in its FOIA processing. Mr. Piper opposed the delay and upon consideration of the briefs of the parties, the district court granted FBI only a two-year stay. Upon expiration of the stay, the district court ordered FBI to process records and over several months FBI processed some 70,000 pages of records of its investigative file on the Virginia Piper kidnapping case. FBI released some 63,000 pages of records, but many of those pages contained significant redactions and deletions, so that in fact the investigative file released to Mr. Piper is heavily redacted. These extensive redactions prevent understanding of the investigation conducted by the FBI in the case. Released documents reveal that FBI destroyed much of the evidence of the kidnapping case after the retrial despite the fact that no convictions had been obtained and the million dollar ransom had not been recovered. Also, DoJ claims it is unable to locate crucial items of evidence such as a trial exhibit used in the retrial of an enlarged photograph of a fingerprint found on a shopping bag in the kidnappers' automobile. A defense expert testifying at the retrial stated that this prosecution exhibit had been enhanced, probably with a pencil, in order to make a match with the fingerprint of defendant Larson.

The parties stipulated to use of a sample to test FBI's withholdings, and the sample was 357 pages of documents filed with the district court on April 14, 2003. The parties' subsequent cross-motions for summary judgment resulted in the district court's opinion and order of December 1,

2003 disposing of the case by granting in part both parties' motions for summary judgment. App. 10. *Piper* v. *U.S. Department of Justice*, 294 F. Supp. 2d 16 (D.D.C. 2003). Upon a later motion by DoJ for relief from judgment under FRCP 60(b) this judgment was amended by the district court's order dated April 12, 2006 which permitted DoJ to withhold six of twenty-three documents previously ordered released by the December 1, 2003 order. App. 3. *Piper* v. *U.S. Department of Justice*, 428 F. Supp. 2d 1 (D.D.C. 2006).

Petitioner Piper appealed the district court's December 1, 2003 and April 12, 2006 judgments, and DoJ did not appeal or cross-appeal. The United States Court of Appeals for the District of Columbia Circuit heard oral argument on his appeal on February 15, 2007, and denied Petitioner Piper relief in a unpublished Judgment filed February 23, 2007, App. 1, 2007 WL 754750; 2007 U.S. App. LEXIS 4272. The Court of Appeals affirmed the judgments of the District Court stated in memorandum opinions filed April 12, 2006 granting DoJ's motion for amendment of judgment related to six documents (App. 3), and the district court's ruling on the case-in-chief dated December 1, 2003, (App. 10). The Court of Appeals affirmed the district court's December 1, 2003 ruling on the case in chief despite the fact that it applies legal tests significantly changed by this Court's later opinion in *National Archives and Records Administration* v. *Favish*, 541 U.S. 157 (2004). The Court of Appeals stated with regard to the Supreme Court's later opinion in 2004 which altered the legal standard, "Nothing in *National Archives and Records Administration* v. *Favish*, 541 U.S. 157 (2004), undermines the District Court analysis". App. 2.

ARGUMENT

I. A conflict exists between decisions of United States circuit courts of appeal as to the proper legal test for FOIA privacy exemptions b(7)(C) and b(6) following this Court's decision in *National Archives and Records Administration* v. *Favish*, 541 U.S. 157 (2004).

On March 30, 2004 after the District Court had decided this case in chief in December 2003, the Supreme Court announced a new test for the balancing of public and privacy interests in applying the b(7)(C) FOIA exemption. *National Archives and Records Administration* v. *Favish*, 541 U.S. 157 (2004). The *Favish* case involved an FOIA request for death scene photographs of the suicide of President Clinton's White House Deputy Counsel Vincent Foster. The Supreme Court in that case recognized the right of surviving family members to object to release of such death scene photographs.

In doing so this Court considered the balancing test for public and privacy interests that arises in application of the b(7)(C) FOIA exemption. The Supreme Court rejected previous narrower definitions of public interest applied by some courts in the balancing test, and articulated the following new standard, "(f)irst, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest." The Supreme Court continued, "(w)e do not in this single decision attempt to define the reasons that will suffice, or the necessary nexus between the requested information and the asserted public interest that would be advanced by disclosure". *Id.*, at 172-173.

Following the Supreme Court's decision in *Favish* the United States courts of appeal have applied significantly differing tests to decide the privacy exemptions. The Second Circuit Court of Appeals has affirmed a five prong test to evaluate the privacy interests of government employees, consisting of (1) Rank of government employee; (2) Degree of wrongdoing and strength of evidence against the employee; (3) Availability of other means to obtain the information; (4) Whether the information sought sheds light on government activity; and (5) Whether the information is related to job function, or is of a personal nature. *Perlman* v. *U.S. Department of Justice*, 380 F.3d 110 (2nd Cir. 2004), *affirming Perlman* v. *U.S. Department of Justice*, 312 F.3d 100, 107 (2nd Cir. 2002). Subsequently, the Second Circuit has applied this five-factor test to an exemption 6 claim to withhold names of lower rank government investigative personnel from a requesting newspaper reporter, concluding that the public interest is negligible and upholding the b(6) exemption claim. *Wood* v. *F.B.I.*, 432 F.3d 78, 89 (2nd Cir. 2005).

By contrast the District of Columbia Circuit has not adopted the Second Circuit's five-prong test, rather it has analyzed individual cases in light of the *Favish* opinion, as it did in a rather cursory manner in this case. *See Judgment*, App. 1. In *Oguaju* v. *United States*, 378 F.3d 1115 (D.C. Cir. 2004), the D.C. Circuit rejected a prisoner's FOIA request and upheld a b(7)(C) exemption claim, finding that requester had offered only a "bare suspicion" of wrongdoing by federal prosecutors in handling the prisoner's request for exculpatory evidence under *Brady*. In *Horowitz* v. *Peace Corps*, 428 F.3d 271 (D.C. Cir. 2005), the Court upheld a b(6) privacy exemption to withhold the name of a teenager who had reported sexual misconduct

by Peace Corps employee Horowitz. The D.C. Circuit found public interest in release of the name virtually non-existent because Horowitz offered virtually no credible evidence of misconduct by the Peace Corps, and that the privacy interest in a matter involving sexual victimization was high. The Court found release of the name "clearly unwarranted" in the wording of the b(6) exemption statute. *Id.*, at 280. In *Boyd* v. *Criminal Division of U.S. Department of Justice*, 475 F.3d 381, 388 (D.C. Cir. 2007) the D.C. Circuit found that prisoner Boyd had failed to produce evidence sufficient to meet the *Favish* standard to overcome an exemption b(7)(C) claim for investigative records related to his criminal conviction.

The First Circuit Court of Appeals likewise has not adopted the five prong test of the Second Circuit, rather it has applied the 'more than a bare suspicion' test of *Favish* in finding that a defendant in a criminal case had produced nothing more than a bare suspicion of government impropriety in seeking information provided by a third party to government investigators in his case. *Carpenter* v. *U.S. Department of Justice*, 470 F.3d 434, 442 (1st Cir. 2006).

In the *Piper* case at issue here, DoJ has conceded that very high public interests exist in the request by granting Mr. Piper a full 100% public interest fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii).[1] FBI Letter, App. 48. The Supreme Court has recognized that the public interest

[1] The FBI interprets the statute to permit full or partial public interest fee waivers, which are granted on a percentage basis reflecting the degree of public interest deemed to be at issue. Therefore the award of a 100% public interest fee waiver in this case is a determination by the FBI of the strongest public interests at issue.

standard for the fee waiver is the core purpose of FOIA of "contributing significantly to public understanding *of the operations or activities of the government.*" *U.S. Department of Justice* v. *Reporters Committee*, 489 U.S. 749, 775 (1989). The Court of Appeals in this case did not properly consider the conceded very high public interest factors in the balancing test for the privacy exemptions. This case is an appropriate one for the Supreme Court to reconcile the conflicting decisions of the courts of appeal in the context of a case that presents strong public interests involving a major unpunished kidnapping and an unrecovered $1 million ransom.

II. A conflict exists between a decision of the Supreme Judicial Court of Maine and the First Circuit and other United States circuit courts of appeal in interpreting the *Favish* decision of this Court.

In 2005 after the *Favish* opinion by this Court, the Supreme Judicial Court of Maine considered a case under the Maine Freedom of Access Act (FOAA) involving a request by a newspaper for access to investigative records related to allegations of sexual abuse by eighteen deceased Roman Catholic priests. In the case, the Maine trial court employed the public interest versus privacy interest balancing test created by the United States Supreme Court for applying FOIA's privacy exemptions. The Supreme Judicial Court of Maine found that the privacy exception in the Maine statute was similar to the b(7)(C) exemption in the federal FOIA, and for that reason "(c)ases decided pursuant to FOIA inform our analysis of Maine's FOAA". *Blethen Maine Newspapers, Inc.* v. *State*, 871 A.2d 523, 529 (Me. 2005); 2005 ME 56. The Supreme

Judicial Court of Maine proceeded to analyze and apply the case precedents of the U.S. Supreme Court and other federal courts to the facts in *Blethen.*

In conflict with the First Circuit's decision in *Carpenter* and the other circuit Courts of Appeals decisions since *Favish* discussed above, the Supreme Judicial Court's majority opinion rejected the concept of requiring evidentiary proof of governmental impropriety to justify release of investigative records for events that occurred many years ago. The majority opinion stated that the central purpose of ensuring the public's right to hold the government accountable would be unnecessarily burdened were the evidentiary proof standard of *Favish* to be adopted in case involving records concerning events occurring two or more decades ago. *Blethen*, at 533. The majority opinion concluded that,

> The public's interest in knowing what the government is up to surely extends beyond the specific concern of governmental impropriety considered in *Favish* . . . An informed citizenry has no less of an interest in information that might document governmental efficiency or effectiveness than it does in information documenting governmental negligence or malfeasance." *Id.*

The Court held that identifying information regarding persons identified in the documents other than the deceased priests should be redacted, and that once so redacted the documents should be released to requester, because "(o)n balance, the identified public interest exceeds the privacy interests associated with the records once they are redacted." *Id.*, at 535.

The Supreme Judicial Court of Maine's decision in *Blethen* is in sharp conflict in its interpretation of *Favish* with the decisions of the United States courts of appeal cited above that have considered the issue. Although these courts are interpreting distinct but similar statutes, the policy issues raised by the conflicting decisions are important ones related to the extent of the public's right to know of government activities in matters of serious public concern. This conflicting analysis and very different result in the degree of public disclosure is an additional reason for the Supreme Court to grant a writ of *certiorari* in this case to clarify these issues.

III. In this case the Court of Appeals improperly failed to apply the *Favish* decision of the Supreme Court.

As previously noted, on March 30, 2004 after the District Court had decided this case-in-chief in December 2003 (App. 10), the United States Supreme Court announced a new test for the balancing of public and privacy interests in applying the b(7)(C) FOIA exemption. *National Archives and Records Administration* v. *Favish*, 541 U.S. 157 (2004). The Supreme Court rejected previous narrower definitions of public interest in the balancing test, and articulated the following standard, "(f)irst, the citizen must show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake. Second, the citizen must show the information is likely to advance that interest." The Supreme Court continued, "(w)e do not in this single decision attempt to define the reasons that will suffice, or the necessary nexus between the requested

information and the asserted public interest that would be advanced by disclosure". *Id.*, at 172-173.

Despite the later decided *Favish* opinion of the Supreme Court, the Court of Appeals in this case affirmed the District Court's opinion and order of December 1, 2003 (App. 10) applying legal standards for exemption b(7)(C) that were significantly altered by the *Favish* opinion. The Court of Appeals made a one-sentence reference to the significant change in the legal standard, saying, "Nothing in *National Archives and Records Administration* v. *Favish* (citation omitted) undermines the District Court's analysis." App. 2.[2]

The new *Favish* standards supercede the prior test applied by the District Court in its December 1, 2003 opinion (App. 10), which was that the requester must show that the release of information in law enforcement files is necessary to confirm or refute compelling evidence that the agency is engaged in illegal activity. *Memorandum Opinion*, 12/1/2003, App. 10 citing *SafeCard Services, Inc.* v. *SEC*, 926 F.2d 1197 (D.C. Cir. 1991). The Supreme Court in *Favish* went on to establish the following standard for the category of cases involving allegations of government impropriety, "(w)e hold that, where there is a privacy interest protected by Exemption 7(C) and the public interest being asserted is to show that responsible officials acted negligently or otherwise improperly in the performance of their

[2] The District Court considered *Favish* in its April 12, 2006 opinion order amending its December 1, 2003 judgment (App. 3, 10), however the government's FRCP 60(b) motion to alter or amend judgment only covered a small amount of documents out of the sample representing the universe of documents. Therefore the District Court only considered *Favish* in relation to these few documents and not the full sample.

duties, the requester must establish more than a bare suspicion in order to obtain disclosure. Rather, the requester must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred". *Favish*, 541 U.S. at 174; 158 L.Ed.2d at 336.

As set out above, *Favish* replaces the *SafeCard* test, and opens the way for consideration of additional public interest concerns other than allegations of government impropriety in balance with privacy interests. The Court of Appeals in this case erred in affirming the district court's December 1, 2003 opinion which applied a legal standard significantly changed by the Supreme Court in 2004. There can be little doubt that the *Favish* test for cases of alleged government impropriety, "belief by a reasonable person that the Government impropriety might have occurred", is a considerably lower threshold than *SafeCard Services'* "compelling evidence that the agency is engaged in illegal activity". But beyond the lowering of that threshold, the Supreme Court very properly recognized that public interest concerns are not limited to the circumstance of allegations that responsible officials acted negligently or improperly. The Supreme Court understandably declined to attempt to define and balance all such public interests in the *Favish* case, and decided that case on its facts and limited its holding to those facts. The instant case is a significant one that involves public interests beyond allegations of official negligence or impropriety and provides an opportunity for this Court to reconcile the conflicting decisions of the circuit courts of appeal on an important evolving aspect of FOIA law – the privacy exemptions.

IV. The government asserts privacy exemptions so extensively that the core purpose of FOIA to understand agency action is defeated.

The FBI granted Petitioner Piper a 100% public interest fee waiver of search and duplication fees for this case pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). In doing so the FBI stated that disclosure of records in this case likely would significantly contribute to public understanding of the activities and operations of the government, and thus conceded the strong public interests involved in this case. FBI Kelso letter granting 100% public interest fee waiver. App. 48. This public interest in understanding the activities and operations of government is recognized by this Court in the *Reporters Committee* case as the core purpose of the Freedom of Information Act of opening agency conduct to public scrutiny, or the right "to know what the government is up to". *U.S. Dept. of Justice* v. *Reporters Committee*, 489 U.S. 749, 772-773 (1989).

Further this Court has pointed to the fee waiver statute as expressing the core purpose of FOIA as "contribut[ing] significantly to public understanding *of the operations or activities of the government.*" *Id.*, at 775. Thus in this case the FBI has conceded the strong public interest considerations at stake and that release of the information will advance those interests, yet its *Vaughn* declaration states that in no instance in the extensive redactions in the tens of thousands of pages of documents did these public interests outweigh privacy interest and result in disclosure of information.[3] The extensive deletions and

[3] To permit adversarial testing of the government's claims of exemption for which it has the burden of sustaining under 5 U.S.C. § 552(a)(4)(B), the "*Vaughn* Index" was established as the means for the

(Continued on following page)

withholdings from the FBI file, estimated by Mr. Piper at thirty percent (30%) of all the material, prevent an understanding of the wisdom of decisions made by the FBI and DoJ in the investigation and prosecution of the case. Such a result defeats the core purpose of the Freedom of Information Act to open agency action to public scrutiny.

As properly recognized by the FBI's grant of a 100% public interest fee waiver in this case, there is a strong public interest in assuring successful investigation and prosecution of violent and extortive crimes such as kidnapping. And the FBI's grant of a public interest fee waiver recognizes that release of such information will significantly contribute to public understanding of these activities and operations of government.

One only need look to other nations to see the devastating effect on society of numerous kidnappings and lack of public confidence in law enforcement agencies or governments. There is a strong public interest in assuring that our nation's investigative and prosecution organizations are properly handling such problems in our society. One important way to assure that we do not become the victims of rampant kidnapping is to facilitate examination and reporting on the investigative and prosecutorial efforts made in our country in major kidnapping cases such as the Virginia Piper kidnapping case. This evaluation becomes more important in a case such as this one in which the investigation was one of the largest conducted by the FBI, and the prosecution was ultimately unsuccessful

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government to attempt to sustain its burden. *Vaughn* v. *Rosen (I)*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

in obtaining convictions and in recovering the ransom money extorted from the Piper family.

And one can look to recent events in our nation to see the potentially detrimental effect of elevating privacy interests above other public interests. Reportedly, in the case of the tragic shootings at Virginia Tech on April 16, 2007, concerns for privacy of mental health treatment records interfered with proper application of laws requiring background checks for purchasers of guns. In that instance, elevation of privacy over other public interests may have contributed significantly to the most devastating shooting incident in our nation's history. It may well be time to reconsider the elevation of privacy interests above all others.

As noted, the $1 million ransom paid by the Piper family has not been recovered other than a few thousand dollars recovered by the FBI. The trauma of the event still weighs on the Piper family survivors, and the troubling mystery of who perpetrated the crime and "got away" with the ransom remains. Thus in the *Piper* case a surviving family member seeks information about government conduct in investigating and prosecuting the crime, unlike the *Favish* case in which surviving family members sought to block access to death scene photographs in government possession.

The District Court in its December 1, 2003 opinion found that allegations of government evidence tampering constitute a public interest sufficient to outweigh privacy interests in a photograph of a fingerprint and an internal FBI report on misidentification of a fingerprint. App. 22. DoJ and FBI did not appeal this decision and provided these documents to Mr. Piper. Thus for that reason as well

there exist conceded strong public interest considerations in this case that support release of additional information to further illuminate official conduct in the case to facilitate public understanding.

a. The public interest is not limited to facts that discredit the government, rather there is also a public interest in knowing about good or even middling government performance.

As noted in questioning by Justices of this Court at oral argument in *Favish*, why should public interests be limited to something that discredits the government? Would there not be a public interest in knowing that the government agency performed well and properly in discharge of its activities, and got the right answer to a problem such as investigating the Virginia Piper kidnapping? *See* Oral argument transcript in *Favish*, December 3, 2003, U.S. Supreme Court website, pages 15-16. Or that government performance is in the middle range between good and bad performance? Given that the core purpose of the FOIA stated by *Reporters Committee* is for the public to know 'what the government is up to', it seems a perverse policy to only inform the public of poor performance or misconduct by the government. To do so might create an artificially negative public perception of the government's actions solely because information about good government performance is not released as not deemed to be of public interest.

Applying those considerations to this case, Mr. Piper seeks to know how well and appropriately the FBI investigated his mother's kidnapping, and whether wise decisions were made. He seeks the truth of what was done by

government agents, good, bad or indifferent, and will write about it. In the context of a major unpunished crime this is an important public interest concern, as recognized by the FBI itself in granting him a 100% public interest fee waiver because disclosure of the records would significantly contribute to the public's understanding of the activities of the government. These broader public interest concerns must be fully explored and weighed against privacy interests in light of the *Favish* opinion. Mr. Piper has presented the facts he knows about the case in his declaration and in news reports attached to the complaint and his declaration. The proper balance resulting from construing the FOIA exemption narrowly and in favor of disclosure will result in a much broader release of information that FBI has protected under the b(7)(C) exemption so that the conduct of the investigation can be effectively judged.

As set forth in a Declaration filed in the district court proceeding, Petitioner Piper seeks answers to unanswered questions about the DoJ and FBI's handling of the case, among them – what did the FBI do to investigate the other group identified by Lynda Lee Billstrom as having planned the kidnapping, and what did they discover? The defense lawyers learned of her statement from FBI documents provided to them by the prosecution during the first trial, thus the FBI knew of her statements implicating another group during its investigation. What did the FBI do to follow up on this story, and what did the FBI come to believe about its veracity? Were the FBI's decisions to pursue Larson and Callahan to the exclusion of the Billstrom group good decisions? Petitioner Piper is unable to discover the answers to these questions because DoJ has shielded the identities of these individuals and information

about the FBI's investigation of these allegations behind the b(7)(C) privacy exemption, as Mr. Piper describes in detail in his Declaration filed in the District Court.

DoJ has granted these persons privacy protection despite the fact that Lynda Lee Billstrom's testimony was aired publicly in the appeal to the Eighth Circuit, and that she testified publicly in the heavily publicized retrial. *See U.S.* v. *Larson*, 596 F.2d 759, 772-776 (8th Cir. 1979). In addition, even though Larson and Callahan were the subjects of two heavily publicized trials and an appeal, sought publicity to advance their cases, and granted Petitioner Piper interviews for his book, the FBI withholds substantial information about them on the basis of b(7)(C) personal privacy. For example, the FBI withholds photographs of Larson even though his photograph was published in the newspapers during the trial proceedings. Another example is that Callahan's face is blacked out in a line-up photograph, as well as the faces of the other line-up participants, thus hiding Callahan's publicly known face, and hindering any understanding of the efficacy of the line-up procedure. Still another example is that the district judge in his December 1, 2003 ruling instructed Mr. Piper to return a photograph of Callahan that DoJ claimed to have been inadvertently released during processing. App. 27, footnote 5. And, inexplicably, the FBI has redacted photographs of Virginia Piper at the recovery site on b(7)(C) privacy grounds even though she is deceased, and the request for the records is made by her son.

Lynda Lee Billstrom, those she implicated in planning the kidnapping, and defendants Larson and Callahan are all public figures in relation to the Virginia Piper kidnapping, yet the FBI grants them personal privacy protection in its processing of the records. Petitioner Piper believes

that the public interests raised by his concerns over the conduct of the investigation have not been properly balanced against privacy interests in this case, and that those public interest concerns implicate issues of possible improper conduct by government agents but extend well beyond that interest. This Court states that a court is obligated to construe FOIA exemptions narrowly in favor of disclosure, and certainly that has not happened in this case. *U.S. Department of Justice* v. *Landano*, 508 U.S. 165, 181 (1993).

Even more support for the public interests in this case is found in the District Court's award of attorney's fees and costs in favor of Petitioner Piper, in which the court found that the public interest is served by Petitioner's pursuit of release of the requested documents. *Piper* v. *U.S. Department of Justice*, 339 F. Supp. 2d 13 (D.D.C. 2004). The government did not appeal this finding of public interest and award of fees and costs. This case presents very strong public interest considerations that have not been properly weighed in the balance, and justify additional disclosure to facilitate public understanding of the agency actions.

b. DoJ has not taken reasonable steps to determine whether persons have died for whom it invokes the privacy exemptions. In fact one of the persons tried for kidnapping Mr. Piper's mother has died, yet this fact has not been taken into consideration by DoJ in its assertions of privacy exemptions. Privacy interests are diminished by death of individuals.

In a recent D.C. Circuit case *Davis* v. *U.S. Department of Justice* the court held that the government must take

reasonable steps to determine the life status of persons for whom it invokes the privacy exemptions since death of an individual greatly diminishes the privacy interest. The Court of Appeals discussed steps that could be undertaken and suggested use of electronic information search capabilities as a possibility in rejecting the government's standard very limited search efforts. *Davis* v. *U.S. Department of Justice*, 460 F.3d 92, 102-103 (D.C. Cir. 2006). In this case the *Vaughn* declarations submitted by the government agencies do not describe *any* efforts undertaken to determine whether individuals are alive or dead, whether by way of checking reference texts or application of a 100 year rule before assertion of the privacy exemption, or in any other way seeking this information.

Further, Petitioner Piper has submitted a news article and death certificate showing that one of the individuals tried for his mother's kidnapping, Kenneth Callahan, has died. Mr. Callahan is central to the documents at issue in this case and there are many redactions about him in the withheld records that are necessary for Mr. Piper's understanding of the investigation conducted. As noted in the recent *Davis* decision, the fact of death is a relevant factor to be taken into account in the balancing decision of public versus privacy interests, and that the government must take basic steps to ascertain whether an individual is alive or dead when claiming the privacy exemption. *Schrecker* v. *U.S. Department of Justice*, 254 F.3d 162, 166-167 (D.C. Cir. 2001).

In that the government has not described in its Declarations any efforts to determine if persons are alive or dead, the case must be remanded for the government to show that it has taken reasonable steps in this regard. These reasonable steps must be taken in light of this D.C.

Circuit's guidance in the *Davis* decision to do more than a cursory effort, and to use modern internet search capability in the effort. Since Petitioner Piper has produced evidence that Kenneth Callahan has died, DoJ must release redacted information about him as part of the review on remand.

CONCLUSION

For the reasons stated, Petitioner Piper respectfully requests the Supreme Court to issue a writ of *certiorari* to the United States Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

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2007 WL 754750

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-5119 **September Term, 2006**
FILED ON: FEBRUARY 23, 2007

[1024536]
HARRY C. PIPER, III,
APPELLANT

v.

DEPARTMENT OF JUSTICE AND
FEDERAL BUREAU OF INVESTIGATION,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 98cv01161)

Before: SENTELLE, RANDOLPH and BROWN, Circuit Judges.

JUDGMENT

This cause was considered on the record from the United States District Court for the District of Columbia, and was briefed and argued by counsel. It is

ORDERED AND ADJUDGED that the judgment of the District Court be affirmed for the reasons stated by the district court in its memorandum opinions filed April 12, 2006 and December 1, 2003. *See Piper v. U.S. Dep't of*

Justice, 428 F. Supp. 2d 1 (D.D.C. 2006); *Piper v. U.S. Dep't of Justice,* 294 F. Supp. 2d 16 (D.D.C. 2003) ("*Piper I*"). The District Court correctly concluded that Appellees' withholding and redacting of the disputed documents was reasonable under Exemptions 7(C)-(E) of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7). The District Court also correctly concluded that Appellees' search for documents in response to Appellant's FOIA request was adequate, *Piper I,* 294 F. Supp. 2d at 21-24, and that the allegation that documents were destroyed *before* Appellant's FOIA request is immaterial as to whether the agencies have met their burden under FOIA; "FOIA does not impose a document retention requirement on government agencies," *id.* at 22. Nothing in *National Archives & Records Administration v. Favish,* 541 U.S. 157 (2004), undermines the District Court's analysis.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The clerk is directed to withhold issuance of the mandate herein until seven days after the resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

428 F. Supp. 2d 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARRY C. PIPER, III **Plaintiff,** **v.** **UNITED STATES DEPARTMENT OF JUSTICE, *et al.*** **Defendants.**	**Civil Action No. 98-1161 (RCL)**

MEMORANDUM & ORDER

(Filed April 12, 2006)

This matter comes before the Court on remand from the U.S. Court of Appeals for the District of Columbia. Upon consideration of plaintiff's motion, the opposition thereto, the applicable law, and the entire record in this case, the Court will grant defendants' Rule 60(b) motion.

I. Background

This dispute grows out of a Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq,* request initiated by plaintiff on December 22, 1997 concerning the FBI investigation of the 1972 kidnapping of his mother, Virginia Lewis Piper. Ultimately, the parties reached an agreement culminating in plaintiff sampling 357 pages from the approximated 80,000 released. The sample documents contained many redactions and withholdings pursuant to FOIA exemptions.

Having completed its search for documents in response to plaintiff's request, the Government moved for summary judgment on May 16, 2003, and plaintiff responded with a cross-motion for summary judgment on June 16, 2003.

In *Piper v. Dep't of Justice,* 294 F. Supp. 2d 16 (D.D.C. 2003) (Lamberth, J.), this Court granted the Government's motion for summary judgment regarding the adequacy of the FBI's search and its application of FOIA Exemptions 7(D), (E), and (C), except for documents 206 and 309. The Court also noted some 23 documents that the Department of Justice ("DOJ") redacted without any justification and ordered that these documents be released in full. DOJ had released to plaintiff redacted versions of these 23 documents but had neglected to label these documents with file or serial numbers. Finding the Government failed to justify the withholding of these documents under the asserted exemptions, the Court ordered them released to plaintiff.

Displeased with the Court's demand for full release of the 23 documents, DOJ filed a motion requesting the court to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e) on December 15, 2003. On March 26, 2004, this Court denied DOJ's motion to alter or amend judgment. *See Piper v. Dep't of Justice,* 312 F. Supp. 2d 17 (D.D.C. 2004) (Lamberth, J.).

On August 18, 2004, DOJ filed a Rule 60(b) motion for relief from judgment because it was finally able to locate the 23 documents and file its reasons for redactions. DOJ also moved the Court of Appeals to stay its proceedings until this court had an opportunity to rule on its 60(b) motion. Their appeal was denied.

On June 13, 2005, this Court stated that "although the court cannot grant DOJ's Rule 60(b) motion while plaintiff's appeal is pending, the court would grant the motion if it had the authority should the Court of Appeals remand the case for such proceedings in accordance with a request from DOJ." *See Piper v. Dep't. of Justice,* 374 F. Supp. 2d 73, 81 (D.D.C. 2005) (Lamberth, J.).

On August 25, 2005, the U.S. Court of Appeals for the District of Columbia remanded this case "to allow the district court to grant the government's Fed. R. Civ. P. 60(b) motion, as the district court has indicated its willingness to do." *See* Order, *Piper v. Dep't of Justice, et al.,* No. 04-5198 (D.C. Cir. 2005). On September 16, 2005, plaintiff filed a supplemental opposition memorandum and seven days later defendants filed their response. Plaintiff also submitted a notice of filing of a recently published news article on December 12, 2005 and defendants filed their response on December 16, 2005.

II. Discussion

Despite this Court's decision in *Piper v. Dep't. of Justice,* 374 F. Supp. 2d 73, plaintiff argues that the Court did not apply the current legal test for FOIA exemptions 6 and 7(C) under *Nat'l Archives & Records Admin. v. Favish,* 541 U.S. 157 (2004). Defendants argue that this Court's disposition of defendants' 60(b) motion comports with the FOIA and the Supreme Court's decision in *Favish.* The Court agrees with defendants.

A. *Favish* Decision

In *Favish,* the Supreme Court stated, "[w]here the privacy concerns addressed in Exemption 7(C) are present," the general "rule that [a party] need not offer a reason for requesting the information must be inapplicable." 541 U.S. at 172. Instead, "the exemption requires the person requesting the information to establish a sufficient reason for the disclosure." *Id.* The requestor must demonstrate that (1) the "public interest sought to be advanced is a significant one" and (2) the information requested "is likely to advance that interest." *Id.* "Otherwise, the invasion of privacy is unwarranted." *Id.*

Plaintiff contends that *Favish* necessitates that this Court modify its decision on defendants' Rule 60(b) motion. Specifically, plaintiff argues the public interest concerns, in "know[ing] how well and appropriately the FBI investigated his mother's kidnaping, and whether wise decisions were made," outweigh the third party privacy interests that the FOIA exemptions protect. (Pl.'s Supp. Mem. 9.) The Court does not agree.

This Court's determination of defendants' Rule 60(b) motion is consistent with *Favish.* As stated in its earlier memorandum opinion on defendants' Rule 60(b) motion, the public interest in knowing how the Department of Justice ("DOJ") handles its investigations "is served whether or not the names and identifying information of third parties are redacted. For example, the public does not need to know the names of people the FBI should not have investigated or investigated less to know that the FBI wasted its time or unwisely spent resources." *See Piper v. Dep't. of Justice,* 374 F. Supp. 2d 73, 80 (D.D.C. 2005).

Accordingly, consistent with *Favish,* this Court has already considered plaintiff's "public interest" argument related to his interest in knowing how FBI handled its investigation, and concluded that disclosure of the privacy-protected information is not "likely to advance that interest." *See McCutchen v. U.S. Dep't of Health & Human Servs.,* 30 F.3d 183, 188 (D.C. Cir. 1994) ("A mere desire to review how an agency is doing its job, coupled with allegations that it is not, does not create a public interest sufficient to override the privacy interest protected by Exemption 7(C)."). Therefore, plaintiff has not presented a "significant public interest" to compel disclosure of the privacy information withheld pursuant to Exemption 7(C).

B. Third Parties' Interest and Participation

This Court also dealt with plaintiff's allegation that the public interest in disclosure outweighs third party privacy interests because of the government's alleged negligence in handling the case. *Piper,* 374 F. Supp. 2d at 81. Specifically, the Court stated that "[p]laintiff has submitted no evidence supporting this contention nor has he even identified who has made these allegations." *Id.* Consequently, this Court has already considered and rejected plaintiff's arguments urging disclosure, despite the third party privacy interests. Contrary to plaintiff's argument, the *Favish* decision does not suggest that this Court needs to disturb its decision favoring protection of third party privacy interests over compromising such interests.

C. Death of Third Parties

Lastly, plaintiff argues that an individuals' privacy interests may have become attenuated by their deaths and that the FBI had an obligation to determine mortality status before balancing privacy interests against any public interest in disclosure. (Pl.'s Supp. Mem. 9-11.) Plaintiff's argument has no merit because plaintiff has presented no public interest indicating that third party privacy interests should be compromised, whatever the status of the individual. *Favish,* 541 U.S. at 172.

In addition, the Court of Appeals in *Schrecker v. U.S. Dept. of Justice,* 349 F.3d 657 (D.C. Cir. 2003), discussed the procedures used by the FBI in making determinations on the mortality status of third parties who are the subject of a FOIA request, and held that the "100-year rule" used by the Agency is reasonable. *Id.* at 665. The "'100-year rule' . . . presumes that an individual is dead if his or her birth date appears in [a] responsive record and is more than 100 years old." *Id.* at 660. The FOIA requests at issue in this case are considerably more recent than the documents at issue in *Schrecker* and there is no reason to think anyone named therein is deceased under the 100 year standard. In any event, even if any of the individuals were deceased, their privacy interests would only be lessened, not extinguished, and would still outweigh the alleged "public interest" in disclosure present in this case. *Accuracy in Media, Inc. v. Nat'l Park Serv.,* 194 F.3d 120, 123 (D.C. Cir. 1999) (holding that the court "squarely rejected the proposition that FOIA's protection of personal privacy ends upon the death of the individual depicted").

III. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Defendants' Unopposed Motion for Leave to File Response to Plaintiff's Notice of Filing, is GRANTED, *nunc pro tunc.* It is further

ORDERED that defendants' Motion for Relief From Judgment Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure is GRANTED. DOJ has already released 17 of the 23 documents in full without redactions (129, 130, 131, 132, 172, 312, 321, 322, 323, 324, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 337, 339 and 340). The remaining six documents (321, 322, 323, 324, 326, and 328) do not have to be released to plaintiff. It is further

ORDERED that this Court's Order of December 1, 2003 is hereby amended accordingly.

SO ORDERED.

Signed by Royce C. Lamberth, United States District Judge, April 12, 2006.

294 F. Supp. 2d 16

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARRY C. PIPER, III	)	
Plaintiff,	)	
v.	)	**Civil Action No. 98-1161 (RCL)**
UNITED STATES DEPARTMENT OF JUSTICE, et. al.	)	
Defendants.	)	

MEMORANDUM OPINION

This case comes before the Court on the motion for summary judgment of defendants United States Department of Justice (DOJ), Federal Bureau of Investigation (FBI), and Department of the Air Force, Office of Special Investigations (AFOSI), and plaintiff's response thereto. Plaintiff Harry C. Piper's cross-motion for summary judgment, defendants' response, and plaintiff's reply is also before the Court. Upon consideration of the briefing, the law, and the record in this case, the Government's motion for summary judgment will be granted, except that the Court orders document 206 and a memorandum referenced in document 309 released to plaintiff. The Court further orders defendant to locate and release to plaintiff documents 129, 130, 131, 132, 172, 312, 321, 322, 323, 324, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 337, 339, and 340. Plaintiff's cross-motion for summary judgment is hereby granted with respect to the aforementioned documents, and denied with respect to all other asserted claims.

I. BACKGROUND

This case arises before the Court under the Freedom of Information Act (FOIA) 5 U.S.C. § 552. On December 22, 1997, plaintiff filed a FOIA request for all records pertaining to the 1972 kidnapping of his mother, Virginia Lewis Piper. Plaintiff plans to write a book about his mother's kidnapping and the resulting FBI investigation and DOJ prosecution of the suspected kidnappers. (Piper Decl. at 1.) Plaintiff's request was submitted to the Executive Office for United States Attorneys (EOUSA) and the FBI. There have been numerous communications between the parties since that date. Plaintiff filed his complaint on May 8, 1998. Defendant DOJ filed its first partial summary judgment motion as to plaintiff's FOIA request to EOUSA on December 15, 1998. The Court denied this motion on April 22, 1999. The last few years have brought exchanges of protective orders and partial summary judgment motions. Several issues have since been resolved, and this case enters its final stage.

The FBI has released approximately 80,000 pages of documents to plaintiff in response to his request. An agreement between the parties was reached culminating in plaintiff sampling 357 pages from the approximated 80,000. This sample, or what is commonly known as *Vaughn* indices in FOIA circles, contains documents that have redactions or have been completely withheld pursuant to several of the nine disclosure exemptions of FOIA. At issue in this case is the adequacy of the FBI's search and the propriety of the FBI's nondisclosure under Exemptions (7)(C), (D), and (E). Having completed its search for documents responsive to plaintiff's request, the Government moved for summary judgment on May 16, 2003.

Plaintiff responded in kind with a cross-motion for summary judgment on June 16, 2003.

II. ANALYSIS

A. The Freedom of Information Act & the Standard of Review

The Freedom of Information Act, 5 U.S.C. § 552, as amended by the Freedom of Information Reform Act of 1986, §§ 1801-04 of Pub. L. No. 99-570, 100 Stat. 3207, 3207-48 (1986), provides citizens a statutory right of access to government information. Underlying the Act is the principle that "the public is entitled to know what its government is doing and why." *Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 868 (D.C. Cir. 1980). It is further established that while "Congress undoubtedly sought to expand public rights of access to Government information when it enacted [FOIA] . . . that expansion was a finite one." *Forsham v. Harris,* 100 U.S. 977, 983 (1980). Accordingly, FOIA instructs government agencies to disclose agency records, unless the requested records fall within one of the Act's nine exemptions. Generally, FOIA requesters challenge agency nondisclosure by either arguing the claimed exemption has been improperly asserted, or by challenging the adequacy of the government's document search.

Summary judgment in a FOIA action is appropriate when the pleadings, together with the declarations, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby,* Inc., 477 U.S. 242 (1986); *see also Alyeska Pipeline Serv. Co. v. EPA,* 856 F.2d 309, 313 (D.C. Cir. 1988) (mere conflict in

affidavits not sufficient to preclude an award of summary judgment); *Weisberg v. DOJ,* 627 F.2d 365, 368 (D.C. Cir. 1980). FOIA matters are reviewed de novo and the nondisclosing agency bears the burden of justifying nondisclosure. 5 U.S.C. § 552(a)(4)(B); *DOJ v. Reporters Comm. for Freedom of Press,* 489 U.S. 749, 755 (1989).

To satisfy the attendant burden, agencies may rely on the declarations of their officials. *See Oglesby v. U.S. Dep't of the Army,* 920 F.2d 57, 68 (D.C. Cir. 1990); *Goland v. CIA,* 607 F.2d 339,352 (D.C. Cir. 1978). These declarations are accorded a presumption of expertise, *Pharm. Mfr. Ass'n v. Weinberger,* 411 F. Supp. 576, 578 (D.D.C. 1976), provided the affidavits are clear, specific, and adequately detailed, setting forth the reasons for non-disclosure in a factual and non-conclusory manner; they must also be submitted in good faith. *See Hayden v. NSA,* 608 F.2d 1381, 1387 (D.C. Cir. 1979). Upon a finding the affidavits are sufficient, the court need not conduct further inquiry into their veracity. *Id.* Accordingly, a plaintiff must proffer proper evidence to support a claim that an exemption has been improperly asserted in order to have a triable issue of material fact that will preclude awarding summary judgment to the defendant. *See Bennett v. Spear,* 520 U.S. 154, 168 (1997).

Agencies declining to produce requested documents must demonstrate that the claimed exemption applies. 5 U.S.C. § 552(a)(4)(B). To demonstrate the validity of the claimed exemption, agencies are required to submit *Vaughn* indices that adequately describe the withheld information and explain how specific exemptions apply. *Vaughn v. Rosen,* 484 F.2d 820 (D.C. Cir. 1973). All reasonably segregable portions must be disclosed once the exempt portions have been redacted. *Oglesby v. U.S. Dep't*

of the Army, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Additionally, the court is required to consider segregability issues even when the parties have not specifically raised such claims. *Trans-Pacific Policing Agreement v. U. S. Customs Serv.,* 177 F. 3d 1022, 1027 (D.C. Cir. 1999).

Challenges to agency searches are guided by a reasonableness standard. *Weisberg v. DOJ,* 745 F.2d 1476, 1485 (D.C. Cir. 1984). To be entitled to summary judgment, an agency need only show "that it has conducted a 'search reasonably calculated to uncover all relevant documents.'" *Id.* (citation omitted). The court's inquiry is concerned with whether the search itself, and not the results of that search, was adequate. *Id.* Adequacy is judged by a reasonableness standard and is contingent upon the facts of each case. *Id.* Agencies may demonstrate the adequacy of their search by submitting "reasonably detailed, nonconclusory affidavits submitted in good faith." *Id.* Affidavits including search methods, locations of specific files searched, descriptions of searches of all files likely to contain responsive documents, and names of agency personnel conducting the search are considered sufficient. *Id.* at 1348.

B. Adequacy of Search

Plaintiff challenges the adequacy of the search undertaken by the FBI for documents responsive to his December 1997 request. He argues the FBI destroyed evidence in its possession. He seeks leave to depose FBI and DOJ personnel suggesting this will lead to information concerning evidence destruction and the location of documents that have not been produced in this case. (Pl.'s Opp'n Mem. at 9, 13.) He further argues that missing records

and gaps in serialization of documents provided to him make summary judgment for defendants on this issue improper. In pursuit of these missing documents, plaintiff claims, based on second hand information from James Lesar, Esq., that the FBI maintains additional abstracts of each record it receives and places these abstracts in a file index card format. These files would constitute a second and third set of records to check for missing content. (Pl.'s Opp'n Mem. at 14-5.)

1. Destroyed Documents

The Government responds to plaintiff's first assertion with the use of colorful adjectives but then provides an actual answer. Defendants argues that plaintiff's request to depose Government personal on the destruction of documents is immaterial as to whether the FBI met its burden. It is also beyond the scope of FOIA. (Defs.' Reply Pl.'s Opp'n Mem. at 2, n.1.) The Government provides no justification for this assertion; however, there is controlling authority to support it. In *Kissinger v. Reporters Committee for Freedom of the Press,* 445 U.S. 136, 151-52, (1980), the Supreme Court asserted that "FOIA is only directed at requiring agencies to disclose those 'agency records' for which they have chosen to retain possession or control." The Court goes on to conclude that "[t]he Act does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained." *Id.* That the Government once possessed responsive documents yet no longer does at the time of the FOIA request does not preclude summary judgment in the Government's favor. FOIA does not impose a document retention requirement on government agencies. *Green v. Nat'l Archives & Records Admin.,* 992

F. Supp. 811, 818 (E.D. Va. 1998). Even where the Government was obligated to retain a document and failed to do so, "that failure would create neither responsibility under FOIA to reconstruct those documents nor liability for the lapse." *Folstad v. Bd. of Governors of the Fed. Reserve Sys.*, 1999 U.S. Dist. LEXIS 17852, at *4 (W.D. Mich. Nov. 16, 1999). Plaintiff seeks leave of this Court to take depositions of current and former FBI and DOJ personnel who have knowledge of document destruction. Plaintiff prays the Court order an investigation and explanation of destruction of evidence because he claims the document destruction was illegal under 44 U.S.C. §§ 3301, 3303, 2107 concerning disposal of government records.

Plaintiff's request is denied because it falls outside the scope of FOIA, thus rendering the issue moot. The documents the Government has destroyed can no longer be produced by worldly means. Destroyed documents are nonexistent and nonexistent documents cannot remain in someone's possession. FOIA is triggered by agencies having actual possession of the requested documents. *Kissinger,* 445 U.S. at 151-52. Even if the arguments concerning possible FBI violations of law regarding document destruction were taken as true, "they do not establish that the defendant actually has possession of the [documents], which is a prerequisite for FOIA liability." *Folstad v. Bd. of Governors of the Fed. Reserve Sys.*, No. 00-1056, 2000 WL 1648057, at *1 (6th Cir. Oct. 26, 2000) (discussing similar allegations that the Government was required by law to retain certain documents but finding it a non-issue as it relates to a FOIA action). Therefore, summary judgment in the Government's favor is not precluded because the FBI does not possess these documents. This is

not to suggest the Court takes lightly allegations of Government malfeasance. The Court has held government agencies accountable for their reproachful conduct in the past with appropriate sanctions. The facts of this case and allegations of wrong doing years before this FOIA action was initiated, however, do not permit a contrary finding to the aforementioned denial of plaintiff's request.[1]

2. Missing Documents

Plaintiff also challenges the adequacy of the Government's search by alleging many documents are missing from the files, and that there are gaps in the serialization of the files. (Pl.'s Opp'n Mem. at 14.) The FBI's Central Record System (CRS) maintains all information the FBI has acquired in the course of fulfilling its law enforcement mandate. (Davis Decl. at 8.) CRS records "consist of administrative, applicant, criminal, personnel, and other files compiled for law enforcement purposes." (Davis Decl. at 8.) This system assigns numerical sequences to files that are broken down by subject matter. (Davis Decl. at 8.) While in the course of processing plaintiff's request, the FBI noted there were twenty-eight deleted page sheets which listed serials not in the files at the time of plaintiff's initial request. (Keeley Decl. at p 40.) Accordingly, the FBI ran a double check of CRS and found that the serial numbers in question "were either omitted or missed

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[1] Allegations of government officials destroying documents germane to a FOIA request *after* that request has been initiated would compel judicial intervention on behalf of the requester. *See generally Judicial Watch v. Dep't of Commerce*, 34 F.Supp.2d 28 (D.D.C. 1998) (discussing discovery issues related to document destruction in violation of FOIA and court orders).

in the serialization process as indicated on most of the deleted page sheets." (Keeley Decl. at 40.) This led the FBI to conclude that no pages existed in these locations within the files. (Keeley Decl. at 41.) In response to the FBI's conclusion, plaintiff asserts the Bureau has additional records it could search to locate the alleged missing documents. Plaintiff is informed by James Lesar, Esq., a member of the bar of this Court who is alleged to have extensive dealings with FBI records, that the FBI maintains two additional abstracts of each record received and indexes these abstracts in a file in index card format. (Pl.'s Opp'n Mem. at 14-5.) Plaintiff accordingly requests this Court order the FBI to check these abstracts.

As previously stated, the court's inquiry regarding the adequacy of a search is the search itself and not the results thereof. *Weisberg v. DOJ,* 745 F.2d 1476, 1485 (D.C. Cir. 1984). Since adequacy is judged by a reasonableness standard, the Court's inquiry is focused on whether the FBI's two searches of its Central Record System were reasonable. The Court is persuaded that the affidavits of Sherry L. Davis and Carol L. Keeley adequately describe the searches of all files likely to contain responsive materials to plaintiff's request. ("[T]he court may rely on '[a] reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive material (if such records exist) were searched.'" (citations omitted)); *Weisberg v. DOJ,* 745 F.2d 1476, 1485 (D.C. Cir. 1984) ("In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith."). Here, the affidavits demonstrate the adequacy of the search because they identify the affiants, their respective positions within the FBI, the

treatment of plaintiff's FOIA request, and explain, in detail, the FBI's Freedom of Information-Privacy Acts (FOIPA) Section's procedure regarding requests and the mechanics and scope of a CRS search. The D.C. Circuit Court of Appeals has stated that "agency affidavits that 'do not denote which files were searched, or by whom, do not reflect any systematic approach to document location, and do not provide information specific enough to enable [the requester] to challenge the procedures utilized' are insufficient to support summary judgment." *Steinberg v. DOJ,* 23 F.3d 548, 552 (D.C. Cir. 1994) (quoting *Weisberg v. DOJ,* 627 F.2d 365, 371 (D.C. Cir. 1980)). The Government's affidavits do not suffer these deficiencies, thus, sufficiently demonstrating the adequacy of the search.

For these same reasons, the Court is satisfied with the FBI's explanation that the twenty-eight missing serials apparently do not exist.[2] The Government's affidavit indicates the FBI double checked the CRS for these documents and they were not found. The Government then provided relevant background information that explains the serialization process and the possibility some documents may have slipped through the bureaucratic cracks of the vast administrative structure that is the FBI. (Keeley Decl. at 40-1.) This explanation is sufficiently detailed to meet the standard of reasonableness regarding the adequacy of the search. *Weisberg,* 745 F.2d at 1485. While the Government's search is sufficient to meets [sic] its burden under FOIA, it should be restated that the

[2] The parties should take note that the missing serials discussed here are not related to the documents ordered disclosed for want of justification. The discussion of those documents is located below under the heading, "Unjustified Documents."

Government enjoys a good faith presumption in FOIA actions. *Ground Saucer Watch, Inc., v. CIA,* 692 F.2d 770, 771 (D.C. Cir. 1981) (citing as an example *Goland v. CIA,* 607 F.2d 339, 355 (D.C. Cir. 1978)). In this case, the Court finds no material issue to rebut the Government's good faith presumption in the processing of this FOIA request. Thus, the Court need not consider speculative, second hand accounts of other possible records that the FBI may or may not have.

C. FOIA Exemptions at Issue

1. Exemption 7(C)

Exemption 7(C) shields from disclosure law enforcement information that "could reasonably be expected to constitute an unwarranted invasion of personal privacy" if released. 5 U.S.C. § 552(b)(7)(C). This subsection is appropriately invoked when the privacy interest is greater than the public interest in disclosure. The agency invoking Exemption 7(C) must first identify and evaluate the privacy interest implicated by disclosure. Then, the agency must balance this privacy interest against the public interest in disclosure. *DOJ v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 776 (1989). In this case, plaintiff argues the FBI failed to properly identify and weigh the public interest.[3] Plaintiff points to the high-profile nature of this case, as it was highly publicized and involved "the largest ransom ever paid in U.S. history", and the newsworthy research efforts of plaintiff for his

[3] Plaintiff does not challenge the FBI's application of nondisclosure Exemptions 1, 2, and 3 under FOIA, so the Court will not partake in any discussion related to those exemptions.

future book on his mother's kidnapping. (Pl.'s Opp'n Mem. at 16.) No convictions for the kidnapping, lack of recovery for the million-dollar ransom paid, a morally failed prosecutor, and accusations of evidence tampering and destruction, all suggest a strong public interest in this case. (Pl.'s Opp'n Mem. at 16-7.)

Much of plaintiff's characterization of the kidnapping of his mother, Virginia Piper, and the characters involved – the prosecuting attorney, FBI, various suspects – show there would be some degree of public interest in this case generally. The interest in the details of this case, and plaintiff's subsequent research into it, would conceivably be an interesting news story; indeed, plaintiff has included with his opposition memorandum a few local news articles profiling his efforts to that end. (Pl.'s Ex. C.) But whether or not FBI documents related to the investigation of Virginia Piper's kidnapping are newsworthy is not in itself the kind of public interest FOIA seeks to serve. *See Reporters Comm. for Freedom of the Press,* 489 at 774. It is settled that "whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the 'the basic purpose of [FOIA] to open agency action to the light of public scrutiny.'" *Id.* at 772 (quoting *Dep't of Air Force v. Rose,* 425 U.S. 352, 372 (1976). Against this backdrop, the Court moves its attention to specific documents plaintiff is seeking.

Plaintiff seeks a photograph of a smudged fingerprint that was lifted off of a shopping bag found in the kidnapper's car; the prosecution alleged it was defendant Larson's fingerprint. (Pl.'s Opp'n Mem. at 7.) Defense experts testified at trial that the photo exhibit of the shopping bag fingerprint introduced into evidence had been enhanced,

probably by pencil, to create sufficient fingerprint identification points to show a match with defendant Larson's fingerprint. (Pl.'s Opp'n Mem. at 7.) Conversely, the FBI states, under an apparent cloud of contradiction, that a responsive document could not be located, (Keeley Decl. at 10), yet withheld under Exemption 7(C) are documents 205-06 that describe a latent fingerprint photograph on a piece of brown paper recovered from an automobile. (Ex. I, Docs. 205-06.) Whether this contradiction is blunder or subterfuge, the Court will not inquire at this time. The Court orders the FBI to release document 206. Allegations the Government tampered with evidence in pursuit of its zealous prosecution of the suspected Piper kidnappers fall within the public interest covered by FOIA. Possible government tampering of evidence in a criminal trial, where liberty is no less at stake than justice, is particularly troubling to this Court. Releasing a photograph of an alleged government-doctored fingerprint sheds light on the FBI's performance of its statutory duties. This is so because collecting evidence and then preserving its integrity for eventual trial in accord with a criminal investigation constitutes a large part of how the FBI accomplishes its law enforcement mandate. Therefore, this photograph falls squarely within the FOIA's statutory purpose of shedding light on how the Government is performing its duties. *See Reporters Comm. for Freedom of the Press,* 489 at 773.

The second prong of an Exemption 7(C) analysis is whether the privacy interest of an individual in nondisclosure is greater than the public interest in disclosure. *Reporters Comm. for Freedom of the Press,* 489 U.S. at 776. In *DOJ v. Reporters Committee for Freedom of the Press,* 489 U.S. 749 (1989), respondents, Reporters Committee for Freedom of the Press, sought information under FOIA

concerning the criminal records of four members of the Medico family. The Medicos family-owned company was found to be a legitimate business dominated by organized crime figures. *Id.* at 757. Respondents sought information on Medico family members past criminal history. *Id.* The pertinent issue was whether Charles Medico's interest in the nondisclosure of any rap sheet the FBI had on him is the sort of personal privacy interest covered by Exemption 7(C). *Id.* at 762. The Court held disclosure of the content of an FBI rap sheet to a third party "could reasonably be expected to constitute an unwarranted invasion of personal privacy" within the meaning of Exemption 7(C). *Id.* at 780. Considering the nature of the information contained in a criminal rap sheet – descriptive information, such as physical characteristics and date of birth, chronological history of arrest, charges, convictions, and incarceration information – the Court found a strong privacy interest in individual criminal histories. *Id.* at 752. Here the document at issue, a photograph of defendant Larson's fingerprint, shares no common characteristics with a rap sheet. Human fingerprint marks are left, in some form or another, on everything we touch. The human eye cannot distinguish one man's fingerprint from another. A fingerprint does not reveal highly personal information about an individual's past criminal conduct *unless* that fingerprint is expressly being used by law enforcement personnel as trace evidence to identify a suspect. Therefore, the Court finds a marginal privacy interest, if any, in the photograph of defendant Larson's fingerprint. In light of alleged FBI evidence tampering at trial, by enhancing the fingerprint in order to have a match with defendant Larson, this Court orders document 206 released to plaintiff.

In addition to the fingerprint photograph, document 309, a Government memorandum dated January 28, 1977, addresses and identifies the fingerprint found on the paper shopping bag as defendant Larson. The issue here is parenthetical information that states: "Separate memo being prepared re administrative action for missed identification." (Ex. I, Doc. 309.) The fate of this memo is not clear. It was not released to plaintiff. There is no accounting for it in the *Vaughn* index. This memorandum, if it exists, will add context and clarity to allegations of evidence tampering and why the FBI identified the fingerprint as defendant Larson's but was unable to match it to him, thereby shedding light on how the FBI is performing its statutory duties. The Government's argument that this document represents an internal administrative matter unrelated to plaintiff's request is tenuous. (Defs.' Reply Pl.'s Opp'n Mem. at 6, n.2.) An allegation as serious as evidence tampering warrants disclosure. Disclosing the memo would aid the public in understanding how its premier federal law enforcement agency handles credible allegations of evidence tampering. Thus further shedding light on how the FBI is performing its duties. *Reporters Comm. for Freedom of the Press,* 489 at 773. Therefore, the Court orders the FBI to release the memorandum that document 309 speaks of concerning administrative action.

Plaintiff also argues that the Government has made substantially over-broad Exemption 7(C) withholdings. (Pl.'s Opp'n Mem. at 22-33.) The FBI asserted Exemption 7(C) to protect names and/or identifying information concerning: (1) FBI Special Agents and support personnel; (2) non-FBI Federal law enforcement personnel; (3) third parties interviewed by the FBI; (4) third parties of investigative interest to the FBI; (5) individuals who

were interviewed; (6) third parties who were mentioned in FBI files; and (7) activities of individuals interviewed under an express assurance of confidentiality. (Keeley Decl. at 27-34.) Plaintiff's arguments against the withholdings are predicated on the relative publicity the Piper kidnapping case received and the FBI's failure to adequately balance the public versus private interest in withholding. (Pl.'s Opp'n Mem. at 22-33.)

The D.C. Circuit Court of Appeals has stated that when examining the government's application of Exemption 7(C), "'disclosing the identity of targets of law-enforcement investigation can subject those identified to embarrassment and potentially more serious reputational harm.'" *Safeguard Services v. SEC,* 926 F.2d 1197, 1205 (D.C. Cir. 1997) (quoting from *Senate of Puerto Rico v. DOJ,* 823 F.2d 574, 588 (1987)). In recognition of this danger, "Exemption 7(C) 'affords broad privacy rights to *suspects, witnesses, and investigators.*'" *Id.* at 1205 (quoting from *Bast v. DOJ,* 665 F.2d 1251, 1254 (D.C. Cir. 1981)) (emphasis added). Therefore, the "public interest in disclosure is not just less substantial, it is insubstantial." *Id.* Plaintiff seeks photographs of defendants, witnesses, possible suspects, and Virginia Piper at the recovery site, as well as a copy of Donald Larson's arrest report, and other informational material the FBI thought necessary to redact. (Pl.'s Opp'n Mem. at 22-33.) Again, the crux of the justification offered for releasing this material is that all the individuals in question have been exposed to media attention. The Court rejects plaintiff's request because the type of information requested is "simply not very probative of the [FBI's] behavior or performance." *Id.* at 1205. Moreover, the D.C. Circuit Court has firmly established that "unless there is compelling evidence that the agency

denying the FOIA request is engaged in illegal activity, and access to the names of private individuals appearing in the agency's law enforcement files is necessary in order to confirm or refute that evidence, there is no reason to believe that the incremental public interest in such information would ever be significant." *Id.* at 1205-206. Here, there is no allegation of illegal government activity that requires releasing the aforementioned photographs and other non-probative materials.

Further tipping the scale in the Government's favor, the Supreme Court held that "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction." *DOJ v. Reporters Comm. for Freedom of the Press,* 489 U.S. 749, 776 (1989). The courts are to seriously limit unnecessary inquiries into factual minutiae which would be a poor use of judicial resources. *See Safeguard Services v. SEC,* 926 F.2d 1197, 1206 (D.C. Cir. 1997). Courts should not go through each issue raised under Exemption 7(C) on an ad-hoc basis. *See id.* When considering the purpose of FOIA, shedding light on an agency's performance of its statutory duty, releasing photographs and non probative informational material on private citizens does nothing to further the policy goals of FOIA. *See Reporters Comm. for Freedom of the Press,* 489 U.S. at 773. Nothing can be learned here about the FBI's performance of its statutory duty by releasing photographs of defendants, witnesses, suspects, and the victim because a photograph reveals zero about the FBI's conduct. All that is learned is that an FBI agent took some photographs. These photographs evince nothing about the *how* the FBI

is performing its duties. This rationale follows for plaintiff's request for Donald Larson's arrest report.[4] This report would shed no light on how the FBI conducts it [sic] legislative mandate. Therefore, the Court categorically finds that the FBI's Exemption 7(C) withholdings were proper under FOIA.[5]

2. Exemption 7(D)

Exemption 7(D) shields from disclosure "records or information compiled for law enforcement purposes . . . [that] could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of record or information compiled by a criminal law

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[4] Donald Larson's arrest report also falls within the Supreme Court's ruling concerning criminal rap sheets in the context of Exemption 7(C). "When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of 'what the Government is up to,' the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir." *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 780 (1989).

[5] Plaintiff brought to the Court's attention that document 318, a photocopy of a photograph, may have been inadvertently released to him by the FBI. Plaintiff has agreed not to publish or release the photograph until this Court rules on the Government's motion. Defendants did not move to have the document removed from public access. The document, however, is included in the Court's categorical ruling that FBI photographs were properly withheld under Exemption 7(C). Accordingly, the Court expects plaintiff to deliver document 318 to defendants if they so request. *Cf. Billington v. DOJ*, 69 F.Supp.2d 128, 137 (1999) ("The disclosure of unredacted records due to an administrative error does nothing to diminish the magnitude of the privacy interest of the individuals named in the such reports.").

enforcement authority in the course of a criminal investigation . . . information furnished by a confidential source." 5 U.S.C. § 552(b)(7)(D). This Exemption affords the most comprehensive protection of all FOIA law enforcement exemptions. *See Irons v. FBI,* 880 F.2d 1446, 1452 (1st Cir. 1989); *See also Brant Const. Co., Inc. v. EPA,* 778 F.2d 1258, 1262 (7th Cir. 1985) ("The courts have thus recognized the need to provide a 'robust' 7(D) exemption to ensure that agencies are not unduly hampered in their investigations and that their confidential sources are not lost because of retaliation against the sources for past disclosure of because of the sources' fear of future disclosure.").

Under Exemption 7(D), an agency must show that a source provided information to the government under either (1) an express assurances of confidentiality or (2) under circumstances that support an implied assurance of confidentiality. *DOJ v. Landano,* 508 U.S. 165, 179-81 (1993). The Supreme Court instructs the courts to make a determination on a case-by-case basis when determining source confidentiality, but also noted that "[i]t may be true that many, or even most, individual sources will expect confidentiality." *Id.* at 176. Even so, the Government is not extended a presumption of confidentiality for all information received during an investigation. *Id.* The relevant inquiry is "not whether the requested document is of the type that the agency usually treats as confidential, but whether the particular source spoke with an understanding that the communication would remain confidential." *Id.* at 172. The level of confidentiality is somewhat discretionary with regard to what the FBI deems necessary for law enforcement. *Id.* at 174.

Plaintiff argues the FBI made unacceptably broad withholdings under Exemption 7(D).[6] He asserts the Keeley Declaration is "bereft of any discussion of the source's relationship to the crime or perpetrators, or even any discussion of the crime itself . . . " and therefore the FBI's (b)(7)(D)-1 withholding is inappropriate. (Pl.'s Opp'n Mem. at 34-5.) Plaintiff also seeks any segregable releasable material from documents 193-94. (Pl.'s Opp'n Mem. at 35.) The Government withheld those documents, source symbol numbers, as necessary to protect sources that have been granted an express assurance of confidentiality. (Keeley Decl. at 37.) Source symbol numbers are assigned to informants that provide information to the FBI on a regular basis. (Keeley Decl. at 37.) The Government asserts that release of this information could lead to the identification of the source. (Defs.' Mot. Summ. J. at 34.)

Plaintiff does not raise any material issues with regard to the FBI's Exemption 7(D)-1 withholdings. General assertions of the "impermissible broad categorical" use of the exemption do not preclude summary judgment. The Supreme Court ruled that an implied assurance of confidentiality can be inferred be either (1) the Government pointing to a narrowly defined circumstance where it would be warranted or (2) showing generic circumstances where the inference may be appropriate. *Landano,* 508 U.S. at 179. The character of the crime and the relation of the witnesses and informants thereto are used to measure the appropriateness of inferring an implied confidentiality assurance. *See Coleman v. FBI,* 13 F. Supp.75, 82 (D. D. C. 1998). In this case, the crime is a kidnapping that involved

[6] Plaintiff does not challenge the Government's Exemption 7(D)-3 withholding, so the Court will not discuss that exemption.

the forcible taking of Virginia Piper from her home in Minnesota in 1972. Two men carrying guns and wearing hoods barged into the Piper residence and handcuffed Mrs. Piper, put a pillowcase over her head, and then shoved her into the back of a stolen car. (Piper Decl. at 1-2.) The forcible and unexpected taking of a person against their will necessarily involves violence. The question is one of degree. The taking of Mrs. Piper was particularly violent because it involved guns as the primary instruments of coercion. Fortunately, Mrs. Piper was returned relatively unharmed from this ordeal but, as with any crime perpetrated with the aid of a firearm, the margin for deadly error was unacceptably high. Donald F. Larson and Kenneth J. Callahan were arrested and convicted on federal kidnapping charges in connection with the crime. These convictions were later overturned. (Piper Decl. at 2-3.) No one has since been charged or convicted for this crime. Because of the violent nature of the crime and that no one has yet been convicted of it, the Court is loath to jeopardize the safety of FBI informants by subjecting them to possible harassment, or worse, if their identities become public. The Court's concern is not put at ease merely because this crime happened over thirty years ago. Therefore, the Court finds that there existed an implied assurance of confidentiality between the FBI and its informants in this case. Accordingly, the FBI properly withheld documents about its sources of information under Exemption 7(D)-1.

The next issue is the propriety of the FBI's (b)(7)(D)-2 withholdings. Due to the Government's assertion that the source symbol numbers are being withheld pursuant to an express assurance of confidentiality, and that releasing that information could possibly lead to an identification of

that source, the Court finds the information is confidential for the purposes of Exemption 7(D). With regard to any possible segregable material, the D.C. Circuit Court announced that "[i]t has long been the rule in this Circuit that non-exempt portions of a document must be disclosed *unless* they are inextricably intertwined with exempt portions." *Trans-Pacific Policing Agreement v. U.S. Customs Serv.*, 177 F.3d 1022, 1027 (D.C. Cir. 1999) (emphasis added). Here, the FBI avers Exemption 7(D) was "asserted to protect information provided by these individuals, but only to the extent that the material might reveal the identity of those individuals." (Keeley Decl. at 36.) The FBI's assertion that materials were withheld only to the extent that such information may reveal the identity of the sources persuades the Court that there are no issues of segregablity to be resolved.[7] If the Bureau decided that fully withholding document 194 was necessary to protect the confidentiality of the sources involved, the Court is satisfied the FBI properly applied Exemption 7(D) in this context.

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[7] Upon review of documents 193-194 for segregability purposes, the Court is satisfied the FBI properly redacted information that could identify the FBI's sources. The Court understands plaintiff's desire to "have this information about the residence [he] grew up in", (Piper Decl. at 17), but FOIA's purpose is to shed light on how the government is performing its statutory duties, not to provide individual requesters with information because they may have a personal stake in it. The Supreme Court clearly stated that "the identity of the requesting party has no bearing on the merits of his or her FOIA request, . . . [and] that the Act's sole concern is with what must be made public or not made public." *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771-72 (1989).

3. Exemption 7(E)

Exemption 7(E) protects from disclosure "records or information compiled for law enforcement purposes . . . [that] would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E). Information properly withheld under this exemption must meet a two-part test: (1) the document or information was "compiled for law enforcement purposes," and (2) the release of the information "could reasonably be expected to risk circumvention of the law." *FBI v. Abramson,* 456 U.S. 615, 622 (1982); *see also Coleman v. FBI,* 13 F.Supp.2d 75, 83 (D.D.C. 1998); *Edmonds v. FBI,* 272 F.Supp.2d 35, 56 (D.D.C. 2003). Plaintiff seeks the results of all polygraph examinations that relate to the Piper kidnapping. He argues that FBI's withholding of polygraph examinations are improper because the techniques involved are "widely known." (Pl.'s Opp'n Mem. at 35.) This line of logic is unpersuasive.

In this case, the withholding agency is the FBI, the nation's chief law enforcement entity. The documents being withheld contain "logistical considerations involved in polygraph examinations." (Keeley Decl. at 39.) The polygraph examinations were administered to individuals in relation to the FBI's criminal investigation into the Piper kidnapping. Therefore, the documents at issue were compiled for law enforcement purposes, satisfying the first prong of the Exemption 7(E) threshold test. The next question is whether the FBI has made a showing that disclosure would frustrate future law enforcement efforts by way of circumvention. The Court is satisfied the Bureau

has met its burden here. The FBI withheld the polygraph information because to release it would "reveal the use of various investigative techniques which are not widely known by the public. The release of this information would disclose the identity of logistical considerations involved in polygraph examinations. Such disclosure would enable subjects of FBI investigations to circumvent similar current used techniques." (Keeley Decl. at 39.) It is widely recognized that release of information with regard to an individual test could foreseeably circumvent the entire polygraph process. *See Coleman,* 13 F.Supp.2d at 84; *see also Shores v. FBI,* 185 F.Supp.2d 77, 85-5 (D.D.C. 2002) (finding the Government's withholding of all information concerning a polygraph examination proper under Exemption 7(E)); *Edmonds*, 272 F.Supp.2d at 56 (stating release of the questions and the coding of the responses would frustrate law enforcement efforts). Releasing the questions and answers of FBI administered polygraph examinations has the potential to allow a cunning criminal to extrapolate a pattern or method to the FBI's questioning technique. Armed with this knowledge, the criminal could anticipate and avoid the questioning strategy of the FBI. Avoiding this strategy does violence to the polygraph examination's function – the discerning of truth. The Court is not inclined to aid and abet society's criminal element by ordering this information released. Hence, the FBI's withholding of polygraph materials was proper under Exemption 7(E).[8]

[8] Plaintiff asserts that the FBI wrongly classified logistical considerations involved in polygraph examinations under Exemption 2, which exempts matters that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). This is much ado about nothing. The fact that the FBI withheld this polygraph

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Defendants also invoke Exemption 7(E) to protect sensitive electronic monitoring devices that are not widely known by the public. (Keeley Decl. at 40.) Plaintiff argues that the crime in question happened over 30 years ago and therefore any monitoring device the Government used is probably widely known today. (Pl.'s Opp'n Mem. at 37.) This argument must fail for the same reasons plaintiff's previous argument regarding Exemption 7(E) failed. The FBI claims it withheld information to the extent that the release of it would disclose the identity of the electronic device used for monitoring purposes. Disclosing it would reduce its effectiveness and allow for individuals being investigated by the FBI to take countermeasures to circumvent the technique. (Keeley Decl. at 40.) Here, revealing the identity of the electronic device and its application would allow criminal types to evade the technique. Subjects of criminal investigations could utilize knowledge of this device by changing their *modus operandi*. *Cf. Shores,* 185 F.Supp.2d at 84 (granting defendants' summary judgment motion regarding withheld numerical ratings which assessed the effectiveness of investigative techniques used during FBI investigations). This makes the FBI's criminal investigative function that much more difficult or, in some cases, impossible. General, non-specific knowledge that the FBI possesses capabilities to electronically monitor the movement of automobiles, for example, or other moving objects is not the same as

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information under Exemption 2 and Exemption 7(D) does not invalidate either withholding. The District Court considered a similar issue and stated that dual exemption "merely reflected a thoughtful consideration of each document rather than a categorical withholding of all polygraph information under a single exemption." *Edmonds v. FBI,* 272 F.Supp.2d 35, 56 (D.D.C. 2003).

identifying the actual device, its function, and its capabilities. Therefore, the Court finds that the FBI appropriately applied Exemption 7(E) in this matter.[9]

4. Unjustified Withholdings

Plaintiff points to specific documents – 129, 130, 131, 132, 172, 312, 321, 322, 323, 324, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 337, 339, and 340 – that the FBI did not justify within its *Vaughn* index. (Piper Decl. at 14-5.) Plaintiff brought these documents to defendants' attention and provided written directions of where to locate them because the file and serial numbers were not placed on the documents. (Piper Decl. at 14-5.) The FBI applied plaintiff's directions and discovered the documents were not in those locations. As such, the FBI concluded that "[t]hese documents could not be justified." (Keeley Decl. at 8, n.5.) Instead of fully disclosing, the Government has chosen to withhold and simply not justify. This is not the way FOIA works.

An essential part of FOIA litigation is the *Vaughn* Index. The index's fundamental purpose is to enable the courts to ensure the government's exemptions are justified and enhance an opposing party's ability to argue effectively against nondisclosure. *Coastal States Gas Corp. v. Dep't of Energy,* 644 F.2d 969, 972 (3rd Cir. 1981). All a requester generally needs to prevail on a challenged exemption is to show that "the agency's *Vaughn* index does

[9] The Court need not address the issue of whether the FBI is required to search its electronic surveillance index (ELSUR). The FBI has properly withheld the information germane to electronic monitoring that plaintiff sought. The matter is therefore settled.

not justify withholding information under the exemptions invoked." *Schiller v. N.L.R.B.*, 964 F.2d 1205, 1209 (D.C. Cir. 1992). Here, there is no justification put forth for the exemptions claimed with respect to these documents. Without justification, the Government has no standing to invoke exemptions. Similarly, the Court cannot ensure a meaningful assessment of the withholdings without justification. That the Government can no longer locate the file and serial numbers for justification purposes does not give it license to withhold information with the caveat that it could not track down the documents when challenged. Defendants' position is not bolstered by the fact that the file and serial numbers were not placed on the documents' face as a result of the FBI's own doing. (Piper Decl. at 14.) The Government's redactions without justification are unacceptable. If the Court granted its imprimatur to exemptions without any justification, the ripple effect would be to encourage government agencies to withhold information first and not find it later. This offends FOIA's strong presumption in favor of disclosure, *Burka v. Dep't of Heath* [sic] *and Human Serv.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (citing to S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)), and does violence to FOIA's purpose of allowing citizens a right to find out "what the government is up to." *Reporters Comm. for Freedom of the Press*, 489 U.S. at 773. Therefore, the Court orders the aforementioned documents released to plaintiff in their entirety.[10]

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[10] While the bulk of these documents were withheld under Exemption 7(C), they do not fall within the Court's categorical ruling under that exemption because that ruling was based on the Government's ability to justify those withholdings. When there is a direct challenge to documents in a representative sample and the Government avers it cannot justify the withholding of those documents, this is all the law

(Continued on following page)

III. CONCLUSION

For the reasons stated above, the Court finds defendants are entitled to summary judgment regarding the adequacy of the search. This Court also finds that the FBI has properly applied Exemptions 7(D) and (E) and grants its motion accordingly. The Court grants defendants' motion with respect to Exemption 7(C) except for the document marked 206. The Court orders that document released to plaintiff and also orders the release of the memorandum referenced in document 309. The Court grants plaintiff's motion with respect to documents 129, 130, 131, 132, 172, 312, 321, 322, 323, 324, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 337, 339, and 340 and accordingly orders them released to plaintiff in their entirety. With regard to allegations of document destruction by the FBI, the Court declares this point moot for purposes of this action. A separate Order consistent with this opinion shall issue this day.

Royce C. Lamberth
United States District Judge

DATE: December 1, 2003

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requires for requester to prevail. *See Schiller v. N.L.R.B.*, 964 F.2d 1205, 1209 (D.C. Cir. 1992).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARRY C. PIPER, III	)	
Plaintiff,	)	
v.	)	**Civil Action No. 98-1161 (RCL)**
UNITED STATES DEPARTMENT OF JUSTICE, et. al.	)	
Defendants.	)	

ORDER

Upon consideration of defendants' motion for summary judgment, plaintiff's opposition and cross-motion for summary judgment, defendants' response, plaintiff's reply, and the entire record in this case and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby **ORDERED** that defendants' motion for summary judgment is **GRANTED** with respect to the adequacy of its search and its application of the enumerated FOIA Exemptions, except with respect to document 206, the memorandum referenced in document 309, and documents 129, 130, 131, 132, 172, 312, 321, 322, 323, 324, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 337, 339, and 340.

It is further **ORDERED** that the FBI release document 206, the memorandum referenced in document 309, and documents 129, 130, 131, 132, 172, 312, 321, 322, 323, 324, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 337, 339, and 340 in their entirety to plaintiff. With respect to these documents, plaintiff's cross-motion for summary judgment is **GRANTED**; in all other respects, plaintiff's cross-motion is **DENIED**.

It is further **ORDERED** that plaintiff's request to depose DOJ and FBI personal regarding destruction of documents is **DENIED**.

This case now stands dismissed with **PREJUDICE.**

SO ORDERED.

Royce C. Lamberth
United States District Judge

DATE: December 1, 2003

312 F.Supp.2d 17

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HARRY C. PIPER, III,	)	
Plaintiff,	)	
v.	)	**Civil Action No. 98-1161 (RCL)**
UNITED STATES DEPARTMENT OF JUSTICE, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on defendants' motion to reconsider, plaintiff's opposition thereto, and defendants' reply to plaintiff's opposition. Upon consideration of the briefing, the law, and the record in this case, defendants' motion to reconsider is denied.

I. BACKGROUND

The factual background of this case is laid out in detail in the Court's Memorandum Opinion of December 1, 2003. The Court need not repeat it here. To place the Government's motion, as well as plaintiff's opposition thereto, in appropriate context, however, a brief review of the case's major points is in order.

This dispute grows out of a Freedom of Information Act (FOIA), 5 U.S.C. § 552, request initiated by plaintiff on December 22, 1997 concerning the FBI investigation of the 1972 kidnapping of his mother, Virginia Lewis Piper. Since that time, the FBI has released approximately 80,000

pages of documents to plaintiff in response to his request. The parties reached an agreement culminating in plaintiff sampling 357 pages from the approximated 80,000 released. The sample-documents contained many redactions and withholdings pursuant to FOIA's nine exemptions. Having completed its search for documents considered responsive to plaintiff's request, the Government moved for summary judgment on May 16, 2003, and plaintiff responded with a cross-motion for summary judgment on June 16, 2003.

In a memorandum opinion issued on December 1, 2003, this Court granted the Government's motion for summary judgment regarding the adequacy of the FBI's search and its application of FOIA Exemptions 7(D), (E), and (C), save for documents 206 and 309. The Court ordered documents 206 and 309 released to plaintiff because they were withheld improperly. The Court also granted plaintiff's motion with respect to documents 129, 130, 131, 132, 172, 312, 321, 322, 323, 324, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 337, 339, and 340. Finding the Government failed to justify the withholding of these documents under the asserted exemptions, the Court ordered them released to plaintiff. It is this finding the Government now asks the Court to reconsider.

II. ANALYSIS

A. Standard for Motions to Reconsider

Defendants filed a motion entitled "Defendants' Motion For Reconsideration of the Court's December 1, 2003 Memorandum Opinion and Order . . . " on December 15, 2003. The Federal Rules of Civil Procedure have no rule specifically addressing motions to reconsider. *See* Fed.

R. Civ. P.; *Rann v. Chao,* 209 F. Supp.2d 75, 77 (D.D.C. 2002) (stating "the Federal Rules of Civil Procedure do not contain anything known as a 'Motion for Reconsideration' " and therefore treating the motion as one to alter or amend judgment). The D.C. Circuit has stated that motions to reconsider are routinely construed as motions to clarify or alter or amend judgment under Rule 59(e). *Emory v. Sec'y of the Navy*, 819 F.2d 291, 293 (D.C. Cir. 1987). This "treatment is appropriate even though the movant does not specify under which rule relief is sought, because any motion that draws into question the correctness of the judgment is functionally a motion under Civil Rule 59(e), whatever its label." *Id.* (internal citation and quotations omitted). The Court will therefore treat defendants' motion to reconsider as cognizable under Rule 59(e).

The district court has considerable discretion in ruling on a Rule 59(e) motion. *Rann,* 209 F. Supp.2d at 78. The court properly invokes its discretion to grant a Rule 59(e) motion if it finds there is (1) an intervening change in controlling law, (2) the availability of new evidence, or (3) the need to correct clear error or prevent manifest injustice. *Anyanwutaku v. Moore*, 151 F.3d 1053, 1057-58 (D.C. Cir. 1998). Rule 59(e) motions are not granted if the court suspects the losing party is using the motion as an instrumentality of arguing the same theory or asserting new arguments that could have been raised prior to final judgment. *Taylor v. DOJ,* 268 F. Supp.2d 34, 35 (D.D.C. 2003) (citing *Kattan v. D.C.*, 995 F.2d 274, 276 (D.C. Cir. 1993) (citations omitted)).

B. Defendants' Argument

The Government has filed a timely motion for amendment of the Court's judgment.[1] The Government neither argues there has been a change in controlling law, nor does it seem to be arguing there is new evidence available. The Government believes that "the Court has misconstrued defendants' actions here and, as a consequence, improperly concluded that defendants failed to justify withholding" documents 129, 130, 131, 132, 172, 312, 321, 322, 323, 324, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 337, 339, and 340. (Defs.' Mot. for Recons. at 1.) Although the Government does not explicitly state on what grounds it seeks relief, its argument is properly considered under the correcting of clear error or preventing manifest injustice standard of Rule 59(e).

1. Clear Error

Courts have generally not defined what constitutes "clear error" under Rule 59(e). *See Oneida Indian Nation of New York v. County of Oneida,* 214 F.R.D. 83, 98 (N.D.N.Y. 2003). What can be learned from scarce case law

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[1] To be timely, Rule 59(e) motions must be filed within ten business days after the court's judgment is entered into the court's civil docket. Fed. R. Civ. P. 59(e); Fed. R. Civ. P. 6(a); *Derrington-Bey v. D.C. Dep't of Corrections*, 39 F.3d 1224, 1225-27 (D.C. Cir. 1994). District courts do not have discretion under Rule 6(b) to expand the ten day period. *Derrington-Bey*, 39 F.3d at 1225. The ten day period to file motions to amend or alter judgment is admittedly short but believed to be necessary because a timely Rule 59(e) motion "deprives the judgment of finality." *Id.* The Court's judgment came down and was entered on the docket on December 1, 2003, and the Government filed its motion to reconsider on December 15, 2003. Excluding weekends and legal holidays, the Government meets the ten business day requirement of Rule 6(b), and its motion is therefore timely.

on the subject is that clear error should conform to a "very exacting standard." *Id.* (quoting *Hopwood v. Texas,* 236 F.3d 256, 272 (5th Cir. 2000)). District courts should have "a clear conviction of error" before finding a final judgment was predicated on clear error. *Id.* (internal citation omitted). The Seventh Circuit declared that a final judgment must be "dead wrong" to constitute clear error. *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

The Government states that relief should be granted because "the *Vaughn* declaration filed in this case clearly demonstrates that the FBI justified its withholding of the above enumerated documents. . . . " (Defs.' Mot. for Recons. at 1.) If the FBI's justifications were as clear as defendants urge, then this Court produced an odd result on December 1. After reviewing the Keeley Declaration – i.e., the *Vaughn* index – again, the Court finds itself in a familiar position. The Keeley Declaration states that "[d]ocuments 129, 130, 131, 132 and 172 was selected and submitted by the plaintiff for justification. . . . These documents could not be justified." (Keeley Decl. at 8 n.5.) It further states that "[d]ocuments 312, 321, 322, 323, 324, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 337, 339, and 340 was selected and submitted by the plaintiff for justification. . . . These documents could not be justified." (Keeley Decl. at 11 n.10.) These statements are certainly clear. The result of their clarity, however, produces a result contrary to the Government's argument and conclusion.

The Government confuses the withholding of material under a FOIA exemption with the justification for that withholding. These are two distinct endeavors. A government agency asserts an exemption when it believes the material being requested is exempt from disclosure under

one of FOIA's nine exemptions. Justification, on the other hand, requires the agency to prepare an itemized index, correlating each withheld document, or portion thereof, with the asserted exemption and the reason(s) why the withheld material is properly exempt. *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973). The Government states that the "documents enumerated above and identified by the Court for disclosure to plaintiff were expressly included among those covered by one or several of these exemptions." (Defs.' Mot. for Recons. at 2.) As the Court noted in its December 1 opinion, the government must justify its exemptions in order to allow the opposing party to argue effectively against nondisclosure. *Piper v. DOJ*, 294 F. Supp.2d 16, 31-32 (D.D.C. 2003) (citing *Coastal States Gas Corp. v. Dep't of Energy*, 644 F.2d 969, 972 (3d Cir. 1981)). Without justification for the exemptions invoked, a meaningful judicial assessment of those withholdings would not be possible. *Id.* at 32. The lack of justification is generally dispositive, resulting in a favorable ruling for plaintiff. *See Schiller v. N.L.R.B.*, 964 F.2d 1205, 1209 (D.C. Cir. 1992). The Government has not persuaded the Court that its December 1 judgment in this regard was conceived in clear error or resulted in such error.

a. Asserting New Arguments

Additionally, the Government argues that the aforementioned language cited by the Court from the Keeley Declaration was meant to refer "to difficulties the FBI had in identifying certain documents based on limited information provided by the plaintiff on the document's location." (Defs.' Mot. for Recons. at 3.) The Government further states that "it was an extreme burden to *locate* and justify

the redactions within these documents by the ninety-day deadline." (Defs.' Mot. for Recons. at 3) (emphasis in original). The Keeley Declaration and Defendants' Motion for Summary Judgment filed on May 16, 2003 are both silent on this "extreme burden" issue. If justifying the exempted documents at issue was unduly burdensome, then, as plaintiff correctly points out in his opposition memorandum at 4, the Government could have moved for another extension of time. The Government did not do this. Therefore, any arguments advanced about hardships and past deadlines are new arguments that could have been raised prior to this Court's December 1 judgment. As a general proposition, Rule 59(e) motions are not granted when losing parties enlist the motion to make new arguments that could have been raised prior to final judgment. *Taylor*, 268 F. Supp.2d at 35 (internal citation omitted). The Court will not disturb this general rule. Relief is therefore denied.

2. Manifest Injustice

Like the clear error standard, courts have not precisely defined what constitutes "manifest injustice." *Oneida,* 214 F.R.D. at 99. Indeed, there is even less case law on the books giving meaning to "manifest injustice" than to "clear error." *Id.* This lack of direction, however, does not affect the Court's finding that manifest injustice would not result from release of the documents at issue. The Court is sympathetic to the Government here and understands its concern regarding the information that will be disclosed as a result of its failure to justify its asserted exemptions. This concern, however, does not compel the Court to exercise its discretion and reconsider

its prior judgment. Assuming without deciding the contested information now being released to plaintiff properly falls under the Government's asserted FOIA exemptions, this result does not rise to the level of manifest injustice contemplated by the D.C. Circuit in articulating the standard for reconsideration. This finding is based on the following premise: "manifest injustice does not exist where, as here, a party could have easily avoided the outcome, but instead elected not to act until after a final order had been entered." *Ciralsky v. CIA*, 355 F.3d 661, 673 (D.C. Cir. 2004) (internal quotations omitted). As noted previously, the Government could have moved for an extension of time if justifying its exemptions was too burdensome in the face of the FBI's approaching April 2003 deadline to submit its *Vaughn* index. The Government elected not to act prior to final judgment. The Court does not now find anything "manifest" about the possible "injustice" that may result from the Government's prior inaction that would compel the Court to disturb its original judgment. *Cf. id.*

III. CONCLUSION

Because the Government has failed to make a showing of clear error or persuade the Court its December 1, 2003 ruling would result in manifest injustice, its motion to reconsider under Rule 59(e) is **DENIED**.

SO ORDERED.

Royce C. Lamberth
United States District Judge

DATE: March 26, 2004

U.S. Department of Justice

[SEAL]

Federal Bureau of Investigation

Washington, D. C. 20535-0001

June 2, 2000

Daniel S. Alcorn, Esq.
Fensterwald and Alcorn
2952 Yarling Street
Falls Church, Virginia 22042

Dear Mr. Alcorn:

Reference is made to your letter dated June 1, 2000, wherein you provided information in support of your client, Harry C. Piper, III, for a waiver of duplication fees for FBI records responsive to his Freedom of Information Act (FOIA) request concerning the kidnaping of his mother, Virginia Lewis Piper.

The request for a waiver of the duplication fees has been considered in accordance with the provisions of Title 5, United States Code, Section 552(a)(4)(A)(iii), which provides for such a fee waiver, in part, "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester."

We have decided that a 100% waiver of fees is appropriate regarding the release of the requested documents. These documents are being assigned for processing.

Sincerely yours,

/s/ John M. Kelso, Jr.
John M. Kelso, Jr.
Section Chief
Freedom of Information-
Privacy Acts Section

Office of Public and
Congressional Affairs